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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5808

ABRAHAM FRANCIS,

Petitioner,

versus

C. MURRAY HENDERSON, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF STATE OF LOUISIANA, RESPONDENT

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STATEMENT OF THE CASE

In 1964 Abraham Francis, petitioner herein, was indicted for murder by the Orleans Parish Grand Jury in New Orleans, Louisiana. R. 7, 11. In 1965 Francis was tried in the Criminal District Court for the Parish of Orleans, found guilty, and sentenced to life imprisonment. R. 7, 11. At no time, either prior to or during his trial, did Francis challenge the method of jury selection in Orleans Parish, R. 6, thus waiving the issue under the then existing Louisiana procedural statute, La. R.S. 15:202, as interpreted by the Louisiana Supreme Court in *State v. Wilson*, 204 La. 24, 14 So.2d 873 (1943), and *State v. Chianelli*, 226 La. 552, 76 So.2d 727 (1954).

to the effect that in Louisiana an attack on the grand jury must be made before the end of the third day after expiration of the grand jury's term, or before trial, whichever is earlier; that an objection to a petit jury must be filed some time prior to trial; and that if the jury issue is not timely raised it is waived. See *Michel v. Louisiana*, 350 U.S. 91 (1955).

Francis did not appeal his conviction to the Louisiana Supreme Court. R. 21, 37-38. However, six years after his conviction, in 1971, he filed a Petition For Writ of Habeas Corpus in the Criminal District Court for the Parish of Orleans, alleging that the grand jury in his case had been chosen in a manner which discriminated against the black race, of which he is a member. R. 22-75. The Louisiana trial court held that Francis had waived his right to raise such questions by not urging them timely. R. 77-78. The Louisiana Supreme Court also denied Francis' Petition for Writ of Habeas Corpus. R. 79.

Thereafter, in March of 1972, Francis filed his Petition For Writ of Habeas Corpus in the United States District Court for the Eastern District of Louisiana. R. 1. The matter was referred to the United States Magistrate, who held an evidentiary hearing.[1] In September of 1973 the United States District Court, acting upon the Magistrate's recommendation, set aside Francis' conviction and sentence on the ground that the Grand Jury which indicted him was invalidly selected in that it discriminated against members of the black race. R. 87-92. Relying on *Davis v. United States*, 411 U.S. 233 (1973), the State of Louisiana

1 See *Wingo v. Wedding*, 418 U.S. 461 (1974), disapproving such a procedure.

appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit reaffirmed its earlier holding in *Jones v. Henderson*, 494 F.2d 47 (1974), and, relying on *Davis v. United States*, supra, held that Francis had waived his right to attack the composition of his grand jury by not acting timely, but remanded the matter to the United States District Court to enable Francis to attempt to avoid the waiver principle by showing actual prejudice. *Newman v. Henderson*, 496 F.2d 896 (5th Cir. 1974); R. 94-100.

On April 28, 1975, this Honorable Court, on application of Abraham Francis, granted a writ of certiorari in order to review the matter. R. 101.

ARGUMENT

I.

The Waiver Principle Of *Davis* Should Apply Equally To The Several States

In *Davis v. United States*, 411 U.S. 233 (1973), the accused, a black man, went to trial without objecting to the composition of the grand jury which indicted him, an issue which under Rule 12(b)(2) of the Federal Rules of Criminal Procedure must be raised by motion prior to trial. Approximately three years after his conviction Davis filed a motion to dismiss the indictment pursuant to 28 U.S.C. 2255, alleging that qualified Negro jurymen had been systematically excluded from the grand jury which indicted him, and that his collateral attack on his conviction could be precluded only after a hearing in which it was established that he

deliberately bypassed or understandingly and knowingly waived his claim to unconstitutional grand jury composition, relying, *inter alia*, on *Fay v. Noia*, 372 U.S. 391 (1963), and *Kaufman v. United States*, 394 U.S. 217 (1969). In holding that Davis had waived his right to challenge the composition of his grand jury, this Court said: (at 411 U.S. 241-242)

> "The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.
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> "* * *
>
> "We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the

> Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review."

The State of Louisiana respectfully submits that the reasoning of *Davis* applies equally well to state criminal proceedings, and that the waiver provision of former La. R.S. 15:202 governs an untimely claim of grand jury discrimination not only during the Louisiana criminal proceeding, but also later on collateral review, whether state or federal.

At the time of Francis' trial in 1965, La. R.S. 15:202 (as interpreted in *State v. Wilson*, supra) provided that in Louisiana criminal proceedings an attack on the grand jury must be made before the end of the third day after the expiration of the grand jury's term, or before trial, whichever was earlier: "otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." See *Michel v. Louisiana*, 350 U.S. 91 (1955). In *Michel* the following relevant language is found: (at 350 U.S. 97)

> "It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury."

Also in *Michel* in footnote 5, 350 U.S. 98, appears the following, which is especially relevant in the present case:

> "Not only may the prompt determination of such preliminary matters avoid the necessity of a second trial, but a long delay in its determination, such as here, makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness. Furthermore, a successful attack on a grand jury that sat several years earlier may affect other convictions based on indictments returned by the same grand jury."

Also pertinent in the instant case is *Tollett v. Henderson*, 411 U.S. 258 (1973), decided the same day as *Davis v. United States*. In *Tollett* this Court held that a voluntary and intelligent plea of guilty forecloses a later attack on the racial composition of the grand jury

which returned the indictment, even though at the time of the plea facts relating to the selection of the grand jury in question were unknown to both the accused and his attorney.[2]

In the instant proceeding Francis was represented by two able black attorneys, A. P. Tureaud and Earl J. Amedee, who because of their race would have felt no hesitation about urging the jury discrimination issue had they felt it was warranted.[3] Further, although A. P. Tureaud may have been lacking in recent criminal practice experience, Francis' other lawyer, Earl J. Amedee, more than made up for this by being a very capable criminal attorney who had been handling criminal cases since he graduated from law school in 1950, who had served as Assistant District Attorney for Orleans Parish from 1958 through 1960, and who at the time of Francis' indictment and trial in 1964-1965 had already appeared for either the State or the defense in countless murder cases. R. 23-26, 43. Thus it was not for lack of experience or carelessness that Messrs. Tureaud and Amedee failed to urge the jury discrimination issue, but rather because they believed it would be a waste of time for the reason that there were blacks on the grand jury and on the petit jury panel, R. 26, and also because an attack on the jury selection process would be "wasted effort", R. 26, in view of the fact that this question had already been litigated in depth in a series of Orleans Parish capital

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2 Of course, in *Tollett*, in fn. 1 at 411 U.S. 260, the issue posed by the present proceeding was expressly left open.

3 For sound reasons black attorneys were often appointed to represent black accuseds in capital cases in Orleans Parish at this time. Pertinently, the three attorneys who represented Bruce Barksdale in the historic jury case at this period were all black.

cases in which eventually both the Louisiana Supreme Court and this Court found no racial discrimination in the selection of juries in Orleans Parish since 1958, when this Court's decision in *Eubanks v. Louisiana*, 356 U.S. 584 (1958), caused the jury selection method in Orleans Parish to be radically changed so as to include blacks on all jury panels. See, *e.g.*, *State v. Barksdale*, 247 La. 198, 170 So.2d 374 (1964), cert. denied *Barksdale v. Louisiana*, 382 U.S. 921 (1965);[4] *State v. Simpson*, 247 La. 883, 175 So.2d 255 (1965), cert. denied *Simpson v. Louisiana*, 384 U.S. 1014 (1966); *State v. Johnson*, 249 La. 950, 192 So.2d 135 (1966), cert. denied *Johnson v. Louisiana*, 388 U.S. 923 (1967); *State v. Brown*, 249 La. 235, 186 So.2d 577 (1966).

There can be no doubt that in 1964 and 1965 Messrs. Tureaud and Amedee evaluated the jury situation in Orleans Parish correctly. As revealed by the massive records dealing with this issue in *State v. Barksdale*, *State v. Simpson*, *State v. Johnson*, etc., supra, there existed in Orleans Parish at this time no intentional, systematic discrimination against the black race in the selection of juries, either grand or petit. A study of these records amply supports the holding of the Louisiana Supreme Court in 1964 that since 1958 there had been no discrimination against blacks in the selection of juries in Orleans Parish, and that economic, psychological, and educational factors adequately explained the fact that although of the total male population in Orleans Parish in these years between the ages of 20 and 64 a little more than 33 per cent were black, only approximately 16 to 20 per cent

4 The *Barksdale* case has recently been back in this Court under docket numbers 74-6322 and 73-1536.

of the males on jury panels in Orleans Parish at this time were black. See *State v. Barksdale*, 247 La. 198, 179 So.2d 374 (1964); cert. denied, *Barksdale v. Louisiana*, 382 U.S. 921 (1965).

In fact, there can be no doubt that had Francis' attorneys thought it worthwhile to attack the existing jury selection method in Orleans Parish prior to Francis' trial they would simply have adopted the issue as raised and litigated in *State v. Barksdale*, supra, the key case, in which the method of jury selection in Orleans Parish — from the appointment of the jury commissioners by the Governor of Louisiana, through the general venire, the grand jury venire, the grand jury selection, the petit jury venire, and the petit jury selection — was explored in depth, and a massive record dealing with the question was made; all of the other capital cases involving blacks which urged the jury discrimination point between 1963-1966 in Orleans Parish tied into the *Barksdale* record by reference. See *State v. Simpson*, *State v. Johnson*, *State v. Brown*, supra.

The main thrust of Francis' argument in brief filed in this Court appears to be that the jury selection process in the several states can only be kept free from racial bias by permitting the jury discrimination issue to be urged for the first time by the accused in a collateral proceeding years after his trial and conviction, unless the State can show under the *Fay v. Noia*[5] test that he deliberately, intentionally, and knowingly by-passed the state procedure for raising the jury dis-

5 372 U.S. 391 (1963).

crimination question prior to trial, a showing which it is well nigh impossible for the prosecution to make.

This contention not only disregards the basics of life in the United States in 1975, when blacks through the ballot box and the voting machine participate fully in the judicial process and are perfectly able to protect themselves from any threatened discrimination in the selection of criminal juries and elsewhere, but petitioner's argument also overlooks the fact that Louisiana, like other jurisdictions, provides a fair and workable procedure for attacking the racial composition of grand and petit juries in criminal cases by the filing of a motion to quash prior to trial. See Arts. 532(9), 533, 535 La. Code Crim. Proc.

Thus, the issue posed by the instant case is not *whether* attacks on the composition of state juries in criminal matters should be permitted, but rather *when* they should be permitted. In this context the State of Louisiana believes that all of the reasons set forth by this Court in its opinion in *Davis* in favor of the doctrine of waiver by failure to timely object to the make-up of the jury prior to trial in federal criminal proceedings apply with equal force to criminal proceedings in state courts. Additionally, it appears that from a sociological point of view a current attack on jury selection processes is much more effective, and hence desirable, than an attack mounted approximately a decade later, as in the instant case. In today's fast moving world events which occurred ten years ago are ancient history.

The principle of comity is also an important factor in the present proceeding. As Mr. Justice Powell said

in his concurring opinion in *Schneckloth v. Bustamente*, at 412 U.S. at 263-265 (footnotes omitted)

> ". . . the present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems. The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries. Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court and then President of the National Center for State Courts, in identifying problems between the two systems, noted bluntly that '[t]he first, without question, is the effect of Federal habeas corpus proceedings on State courts.' He spoke of the 'humiliation of review from the full bench of the highest State appellate court to a single United States District Court judge.' Such broad federal habeas powers encourage in his view the 'growing denigration of the State courts and their functions in the public mind.' In so speaking Justice Reardon echoed the words of Professor Bator:
>
> 'I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an in-

> discriminate acceptance of the notion that all the shots will always be called by someone else.'
>
> "In my view, this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate. This can be accomplished without retreat from our inherited insistence that the writ of habeas corpus retain its full vitality as a means of redressing injustice."

The principle of comity requires that the waiver rule of *Davis* be available to the several states. Louisiana respectfully submits that the waiver standard expressed in former La. R.S. 15:202 should govern an untimely claim of jury discrimination not only during the Louisiana criminal proceeding, but also later on federal collateral review.

II.

The "Actual Prejudice" Principle of *Davis* Should Also Apply To The Several States

In *Davis* this Court quoted with approval the following excerpt from its opinion in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), on which the lower court had relied in denying relief, regarding the question of prejudice:

> ". . . where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant of relief from the effect of that Rule." 371 U.S. at 363.

Thereafter, this Court's opinion in *Davis* continues thus: (411 U.S. at 244-245)

> "Petitioner seeks to avoid this aspect of *Shotwell* by asserting that there both lower courts had found that petitioners were not prejudiced in any way by the alleged illegalities whereas under *Peters v. Kiff*, 407 U.S. 493 (1972), prejudice is presumed in cases where there is an allegation of racial discrimination in grand jury composition. But *Peters* dealt with whether or not a white man had a substantive constitutional right to set aside his conviction upon proof that Negroes had been systematically excluded from the state grand and petit juries which indicted and tried him. Three Justices dissented from the Court's holding of such a substantive right on the ground that no prejudice had been shown, and three concurred separately in the judgment. But the three opinions delivered in *Peters*, *supra*, all indicate a focus on the existence of the constitutional right, rather than its possible loss through delay in asserting it. The presumption of prejudice which supports the existence of the right is not inconsistent with a

holding that *actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.*" (Emphasis ours)

In the interest of comity, finality, and reasonably current dockets, the State of Louisiana respectfully submits that for the several states as well as for the federal government the "waiver-by-failure-to-object" and "actual-prejudice" principles of *Davis v. United States* should prevail over the "deliberate by-pass" test of *Fay v. Noia*, 372 U.S. 391 (1963). Otherwise, the administration of criminal justice in the several states will continue to be unduly hobbled by the relitigation of ancient issues which should have been forever waived by not being timely raised prior to the original trial.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit in the instant case.

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CERTIFICATE

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